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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

GEOFFREY S. STEWART
DONALD B. AYER
ROBERT P. DUCATMAN
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

CHARLES R. NESSON
WILLIAM W. FISHER
JONATHAN L. ZITTRAIN
THE BERKMAN CENTER FOR INTERNET & SOCIETY
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-7547

LAWRENCE LESSIG
(Counsel of Record)
KATHLEEN M. SULLIVAN
ALAN B. MORRISON
EDWARD LEE
STANFORD LAW SCHOOL CENTER FOR INTERNET & SOCIETY
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-0999

CHARLES FRIED
Griswold Hall
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4636

Counsel for Petitioners

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INTRODUCTION

In 1998, Congress made a choice about who would have the right to develop and exploit 75 years of American culture. After extensive lobbying by the current owners of copyrighted works constituting an important part of this culture—including the heirs of some of America's most famous artists, as well as major media corporations—Congress chose these owners over the public at large.

Congress did not narrow its grant to works currently commercially exploited (at most 2% of the work copyrighted during the first twenty years of this period). Pet. Br. 7. It did not condition its grant upon the restoration of decaying work, or upon the dissemination of any work in any manner whatsoever. Instead, Congress simply created millions of new "exclusive Right[s]"—monopolies on the right to speak—with nothing more than a wish that the owners of these rights would exploit them in the ways Congress desired.

The essence of the government's argument in this case is that this massive redistribution of rights over popular and scientific culture gets the same level of review under our Constitution as milk subsidies, or OSHA regulations. On the government's view, this Court must permit such reallocations of the right to speak—not just the right to "copy" speech, but to develop it, and distribute it free of legal regulation—so long as Congress can posit any hypothetical end that this regulation of speech might advance.

"We [should] pause to consider the implications of the government's arguments." *United States v. Lopez*, 514 U.S. 549, 564 (1995). Although the most carefully articulated clause in Article I, sec. 8, expressly requires that any "exclusive Right[s]" over speech be granted for "limited Times" only, Congress, on the government's view, remains perpetually free to choose whether and when these "exclusive Right[s]" will expire. The public domain thus becomes a matter of legislative grace. And though it is uncontested that the First Amendment must police any regulation of how Amicus AOL Time Warner speaks across its cable lines, *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), on the view of the government, a choice by Congress to "transfer from ordi-

nary citizens to . . . [AOL] Time Warner" speech rights over a significant part of American culture gets a First Amendment free-pass. Richard Epstein, *Congress's Copyright Giveaway*, Wall St. J., Dec. 21, 1998, at A19. Because of the rise of the Internet and the expansion of copyright law, copyright regulation has never been more significant to the development of popular and scientific culture. But on the government's view, our Constitution is blind to this form of speech regulation. Congress has a perpetual right to determine who may use our culture freely, and who must license before they may speak.

This extraordinary conclusion has no support in the Constitution's text, or this Court's cases. Nor is it validated by the partial history that the government presents. Under both the Copyright Clause and the First Amendment, blanket retroactive reallocations of the right to speak and develop culture—to spread it, to adapt it, to extend it in ways different from the original author's desire—merit heightened review. Under any form of heightened review, CTEA fails.[1]

I. CTEA EXCEEDS CONGRESS'S COPYRIGHT CLAUSE POWER

The government's argument in this Court confirms Judge Sentelle's charge below: on its theory of the Copyright Clause, there is no "stopping point" to Congress's power to extend "limited" terms. Pet. App. 17a. So long as Congress specifies some term, the government maintains that any rational basis is enough to justify extending that term. Thus, while this Court has recog-

[1] Contrary to the claims of the Bureau of Nat'l Affairs, Br. at 5-13, this case is clearly justiciable. Petitioner Dover Publications had planned to republish a number of works copyrighted in 1923. J.A. 18-19. Because it would face civil liability under CTEA, and criminal liability under the NET Act, 17 U.S.C. § 506(a), Dover Publications has standing to sue the Attorney General to have CTEA declared unconstitutional. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988); *see also Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 n.9 (1977) (one petitioner sufficient for justiciability). Moreover, contrary to BNA's assertions, prosecuting copyright violations is a high priority of the government. U.S. Dep't of Justice, Intellectual Property Cases, http://eldred.cc/g.

nized certain *implied per se* limits on the scope of the copyright and patent power,[2] the one clearly *express* limit in the Constitution's text, "limited Times," imposes but a trivial restriction on Congress's authority. On the government's theory, "[t]he Congress that can extend the protection of an existing work from 100 years to 120 years; can extend that protection from 120 years to 140; and from 140 to 200 . . . ." Pet. App. 18a. (Sentelle, J., dissenting). *Cf. Pennock v. Dialogue*, 27 U.S. 1, 19 (1829) (Story, J.) (creative work to enter public domain "at as early a period as possible"). Neither the Framers' text nor framing history justifies such a result.

A. History Does Not Validate CTEA

The core of the government's argument is that history sanctions CTEA: That a "consistent practice" since the founding demonstrates that the First Congress "unquestionably understood that [Congress] had authority to apply a new, more favorable term to existing works," Resp. Br. 8, 13—independent of any quid pro quo, and regardless of whether the new term "promote[s] ... Progress." Resp. Br. 9-19. There is no such "consistent practice" that validates CTEA.

1. The Act of 1790 Does Not Validate CTEA

The government argues that the First Congress not only "appl[ied] its new copyright term to subsisting works; it *extended* and *strengthened* legal protection (temporally and geographically) beyond that available when the authors created them." Resp. Br. 16. This claim ignores a crucial part of the framing history, and is demonstrably false.

As petitioners acknowledged, the 1790 Act granted protection to "subsisting works"—both published works and works created but not yet published. Copyright Act of May 31, 1790, 1 Stat. 124; Pet. Br. 29. Of these works, a *tiny* fraction was protected un-

[2] *See, e.g., Feist Publ'ns v. Rural Tele. Serv. Co.*, 499 U.S. 340, 346-47 (1991) (copyright limited to original works); *Graham v. John Deere Co.*, 383 U.S. 1, 4 (1966), citing *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248 (1851) (patents limited to novel inventions); *Feist*, 499 U.S. at 350 (neither patent nor copyright may shrink public domain); *Graham*, 383 U.S. at 6 (same).

der state *statutory* copyright. *See* G. Thomas Tanselle, *Copyright Records and the Bibliographer*, 22 STUD. IN BIBLIOG. 77, 83-85 (1969) (counting 44 state copyrights from five states). For these works, the 1790 Act *may* have extended the term of protection.

The "may," however, points to the critical historical fact that the government simply omits. As petitioners also argued, at the time Congress passed the 1790 Act, there were many who believed that the *common law* protected "literary property," not only before publication but also after. Pet. Br. 28-29.[3] This common law right was perpetual. And thus for works protected by the common law (arguably many times the number protected by state statute[4]), the 1790 Act would have *reduced*, not "*extended*," the effective term of protection.

Which rule governed, or which rule governed more, was a matter of significant and continuing uncertainty at the time of the framing. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 660 (1834); 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 483 (1953). A work whose

[3] Madison declared the common law protected an author's copyright. THE FEDERALIST NO. 43, at 309 (B. Wright ed. 1961). He likely derived his understanding from Blackstone. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 406-07 n.h. (Robert Bell ed. 1771) (first American edition). Blackstone had defended his view in *Millar v. Taylor*; Lord Mansfield adopted it. 98 Eng. Rep. 201, 218, 228-29 (K.B. 1769). The House of Lords reversed later *Millar*. *Donaldson v. Beckett*, 4 Burr. 2408 (H.L. 1774) (Statute of Anne terminated common law right), but as the Statute of Anne did not apply in the colonies, there was still uncertainty about whether the common law in America allowed a perpetual right. *See* 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 477 (1953) ("the Common Law . . . was in a highly uncertain state[] on the subject of copyrights"); *see also Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (recognizing paralleling histories).

[4] The common law right would attach upon creation, while state rights required registration and often deposit. In any case, the number protected under state statutes was very small. As recent archival work confirms, of the 21,000 imprints recorded over the period from 1790 to 1800, there are records of just *12* works (fewer than .05%) copyrighted under the 1790 Act that had been published before 1790. Fewer than half of these were protected under state statutes. *See* William J. Maher, *Copyright Term, Retrospective Extension, and the Copyright Law of 1790 in Historical Context* 7-10 (2002), http://eldred.cc/m.

statutory copyright expired in one state might still be protected by the common law in another. Indeed, in some states, the statutory copyright expressly exempted any parallel common law rights. *Id.* (describing Connecticut.) Thus, a publisher, or author, could not know with certainty that a creative work was no longer subject to legal control, because no clear line divided the "public domain" from "literary property."

Against this background, one obvious purpose of the 1790 Act was to eliminate uncertainty by "extinguish[ing], by plain implication of 'the supreme Law of the Land,' *the perpetual rights which authors had, or were supposed by some to have, under the Common Law*." CROSSKEY, *supra* at 486 (emphasis added). A federal right would terminate any claim to perpetual protection, and thereby establish an effective public domain of works that could be spread across the nation at low cost.

The First Congress achieved this effect by offering "authors and proprietors" of existing works a bargain: *In exchange* for a new federal right, the author or proprietor would abandon his common law or state statutory right. This new federal right may or may not have been stronger than the right it replaced. That would depend upon how the common law was interpreted. Nor was it even certain that the common law and state statutory rights would survive the establishment of a federal regime.[5] But in the face of uncertainty, Congress responded in a way as old as the concept of bankruptcy: by liquidating uncertain common law and state claims *in exchange* for a clear, and new, federal right. *Wheaton*, 33 U.S. at 661.

The requirement of an exchange was built into the statute. Unlike the Statute of Anne, which simply granted rights to existing works as of a certain date, 8 Anne ch. 19 (1710), the 1790 Act required registration and deposit before any federal right vested. Act of 1790, Act of May 31, 1790, § 1, §§ 3-4. These requirements were conditions upon the federal right. *Wheaton*, 33 U.S. at

[5] *Compare* Resp. Br. 17 n.9 (citing Bugbee's claim that preemption is "dubious") *with* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 469 (2002) (expectation of preemption "reasonable").

664-65. Performing them would manifest the abandonment of any other right. *Cf.* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 101 (1825) (England) ("the protection of a statute has been likewise extended, which at the same time disposed of the common law question, as to those who complied with its forms").

This exchange of a state or common law right for a new federal right plainly "promote[d] Progress." Uncertainty about any property right, but especially an intellectual property right, inhibits the use and development of that property. Clarifying such uncertainty, by effecting a transition between two legal regimes, would advance the aim of the Copyright Clause ("promote . . . Progress") through its enumerated means ("by securing [Rights] for limited Times"). The 1790 Act thus offered (1) "limited" terms (2) in exchange for (3) a progress-promoting act.

The government simply ignores this history. And by focusing attention upon an imprecision, the government creates a mirage of consistency across history when in fact there is none. By shifting between the claim that Congress has "consistently" extended the term of "subsisting works," Resp. Br. 1, 6, 8, 12, 16, 22, 23, 30, 38, and the claim that Congress has "consistently" extended the term of "subsisting copyrights," Resp. Br. 2, 3, 5, 9, 13, 23, 34, 37, the government obscures the critical difference between the 1790 Act and every later act. The 1790 Act offered copyrights to all "subsisting works." The 1831, 1909, and 1976 Acts *did not*. These statutes offered terms to "subsisting copyrights"—expressly excluding existing works in the public domain. *See* Act of Feb. 3, 1831, 4 Stat. 36, ch. 16, §§ 1, 16, 4 Stat. 436, 439; Act of March 4, 1909, § 7, 60 Pub. L. 349, 35 Stat. 1075, 1077; Act of 1976, § 303, Pub. L. No. 94-553, 90 Stat. 2541, 2573 (1976). The difference is fundamental: It acknowledges the transition the 1790 Act was to effect, and its role in crafting the public domain that subsequent acts took for granted. The 1790 Act is thus different in kind from the three copyright acts that followed it, and, as the chart in the Addendum demonstrates, different in detail.

CTEA too is fundamentally different from the 1790 Act. It does not offer "subsisting copyright" holders a (1) "limited" term. *See infra* § I.B. And it certainly does not offer that term (2) in exchange for (3) a progress-promoting act. The beneficiaries of CTEA need do nothing to receive its benefit; the gift is automatic. Nor does their receipt of this gift realize a progress-promoting act. Indeed, as economists Akerlof *et al.*, demonstrate, Br. at 13-14 ("anti-commons"), by extending rights indiscriminately, CTEA *increases* uncertainty over existing works, thereby inhibiting, rather than promoting, progress. *See Festo Co. v. Kabushiki,* 122 S. Ct. 1831, 1837 (2002) ("clarity is essential to promote progress . . . . A [rights] holder should know what he owns, *and the public should know what he does not.*") (emphasis added). Hundreds of thousands of new rights are created without any effective way to know who the present holders of these rights are. CTEA thus has *precisely the opposite effect* of the 1790 Act, through means that are fundamentally different. 1790 is no precedent for CTEA.

2. Subsequent Acts in Congress

Without the 1790 Act, the government has *no framing precedent* to contradict the plain meaning of the Copyright Clause. The three subsequent copyright acts that it relies upon are all far removed from "contemporaneous and weighty evidence of the Constitution's meaning." *Printz v. United States*, 521 U.S. 898, 905 (1997) (citations omitted). Indeed, none of the cases that the government cites gives any interpretive weight to congressional action two generations removed from the framing, as the 1831 Act is. Resp. Br. 11-12.

All three subsequent statutes are distinguishable from CTEA.[6] And even if they were not, there is no authority to suggest that

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[6] The government claims that the 1831 Act (like CTEA) "applied the new copyright term to newly created and subsisting works [sic] alike." Resp. Br. 1. It did not. It granted its benefits to works in their *initial* term only—meaning presumptively *to authors*. Act of February 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439. CTEA's benefit is presumptively to heirs. If, as the government argues, granting retroactive, unconditional "bonuses" to authors for work done in the past can inspire them to work harder in the future, Resp. Br. 30-33, then while the 1831 Act would violate petitioners' *per se* rule, it is conceivable that a proportionality standard would find the extension constitutional. It could not validate CTEA. The 1909 Act is not subject to any similar saving interpretation,

three statutes enacted over the course of 150 years suffice to alter the Constitution's meaning. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 566 n.19 (1976) ("neither long-standing congressional authorization nor widely prevailing practice justifies a constitutional violation").

Nor do early extensions of patents provide authority for the view that Congress may extend terms without regard to whether they "promote . . . Progress." The government characterizes these extensions as guided by "equi[ty]." Resp. Br. 13. But the "equity" of these early extensions was to assure that the patent holder got the benefit of his *original* bargain. Such individual, narrowly tailored term extensions—which were (1) never challenged in this Court on the basis of "limited Times,"[7] (2) almost universally based on some failing by the government leading to inadequate compensation,[8] and (3) directed to facilitating the further spread of the invention at stake—cannot support the blanket unconditional extension of CTEA. They each "promote. . . Progress" in a way that CTEA does not.[9]

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though obviously Congress's actions 120 years after the framing offer no insight into original meaning. In any case, the only extensions that could possibly be affected by a decision in the instant case are those effected by the 1976 Act. As the government points out, the 1976 Act, like the 1790 Act, offered its benefits *in exchange* for a similar (though not identical) termination of background common law rights. On the precedent of the 1790 Act, that may save the 1976 Act. In any case, for the reasons Amicus Association of American Publishers advance, Br. at 27-30, the "disruption" of applying petitioners' *per se* rule to the 1976 Act may well bring it within a narrow exception to retrospective application of new law suggested in *Ryder v. United States*, 515 U.S. 177, 185 (1995) and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995) (Kennedy, J., concurring).

[7] In *Evans v. Eaton*, 8 F. Cas. 846 (C.C.D. Pa. 1816) (No. 4,559), *rev'd*, 16 U.S. (3 Wheat.) 454 (1818), the extension was challenged on the basis of the Contracts Clause. In *Evans v. Jordan*, 8 F. Cas. 872, 874 (C.C.D. Va. 1813) (No. 4,564), *aff'd*, 13 U.S. (9 Cranch) 199 (1815), the only constitutional provision mentioned was the Ex Post Facto Clause. 13 U.S. (9 Cranch) at 200. Contemporary writers doubted whether the extension was constitutional. *See, e.g., Thompson v. Haight*, 23 F. Cas. 1040, 1047-48 (C.C.S.D.N.Y. 1826) (No. 13,957); WILLARD PHILLIPS, LAW OF PATENTS FOR INVENTIONS 370-71 (1837).

[8] Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution*, 49 J. COPYR. SOC'Y 19, 107-09 (2002). *See, e.g.,* AMERICAN STATE PAPERS, NO. 207, 1 MISC. 453 (1806) (though patent holder's plant destroyed by fire, no extension because no government error).

B. CTEA's Term Is Not "Limited"

The government charges petitioners with "proposing to convert [a] grant of power into a limitation." Resp. Br. 19. Petitioners concede this is their aim. But this conversion was recognized almost forty years ago. As the Constitution plainly states, and as this Court clearly affirmed in *Graham v. John Deere Co.,* 383 U.S. 1, 5 (1966), "[t]he clause is both a grant of power and a limitation." Indeed, the "grant of power" *is* a "limitation": as this Court stated, speaking of the "promote . . . Progress" clause, "[t]his is the standard expressed in the Constitution *and it may not be ignored*." *Id.* at 6 (emphasis added).

Yet "ignoring" the grant of power is precisely the government's strategy. Rather than reading the text of the Clause along with the "words and sentences with which it stands connected," *Wheaton,* 33 U.S. at 661, the government dismisses the grant of power as a mere "preamble," which, as the court below held, "constitutes [no] limit on congressional power." Pet. App. 10a. That permits the government to interpret "limited" abstracted from the rest of the Clause. So interpreted, a term is "limited" in the government's view even if another "limited term" can be added to it—or, as in CTEA's case, added to it twice.[10] This interpretation is without merit.

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[9] *McClurg v. Kingsland,* 42 U.S. (1 How.) 202 (1843), relied upon by the government, Resp. Br. 20, is not to the contrary. Despite the government's suggestion, *McClurg* did not involve a change in a patent *term.* The law at stake "authorized the issuing [sic] a new patent, when an original one was invalid by accident, inadvertence or mistake . . . ." 42 U.S. at 207. The power to enact that law arises from the "to secure" language in the Clause. As that language is not an express limitation on Congress's power, the fact that changes pursuant to it may apply retroactively would not say anything about retroactive changes of term—because, again, "[t]ime[]" is an express limitation in the Clause.

[10] The government argues that adding a "limited term" to a "limited term" does not render the term "unlimited," just as extending the time to file a brief does not render the time for filing a brief "unlimited." Resp. Br. 10. True. But the constitutional question is not whether a term is "unlimited"; the question is whether it is "limited." If a printer sells "limited edition prints," but reprints new copies

1. The Grant of Power Is Not a "Preamble"

On the basis of a treatise, the government asserts that the grant of power in the Copyright Clause is a mere "preamble" which has no effect on the interpretation of the Clause. Resp. Br. 18-19. This claim is incorrect.

As Judge Sentelle argued below, the grammatical structure of the Copyright Clause is both unique in Article I, sec. 8, and unambiguous: It grants Congress a particular power ("to promote the Progress of Science") which Congress is to pursue through specified means ("by securing for limited Times to Authors . . . exclusive Right to their . . . Writings . . ."). Pet. App. 18a-19a. Like every other power in Article I, sec. 8, "to promote the Progress of Science" is the direct object of "Congress has the power . . . ." Removing that object renders the clause meaningless: "Congress has the power … by securing for limited Times to Authors the exclusive Right to their Writings." *Accord* WALTERSCHEID, *supra,* at 160, 265; Lawrence B. Solum, *Congress's Power to Promote the Progress of Science*, 36 LOY. L.A. L. REV. __ (forthcoming 2002) (preamble interpretation "untenable"), http://eldred.cc/s. There is therefore no warrant, in grammar or authority, for ignoring constitutional text.

2. The Grant of Power Has Interpretive Effect

This Court has recognized limitations on the scope of Congress's Copyright and Patent Power which make sense in light of the grant of power. In *Feist Publ'ns v. Rural Tele. Serv. Co.,* 499 U.S. 340, 346-47 (1991), for example, this Court affirmed that copyright can only extend to works that are "original." In the same case, the Court reaffirmed that neither copyrights nor patents could extend to works in the public domain. *Id.* at 350 (copyrights); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 146 (1989), citing *Graham,* 383 U.S. at 6 (patents). As petitioners have argued, these *implied* limitations on the scope of the

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whenever customers so demand, the print runs might not be "unlimited" (as they depend upon new customers), but they would certainly not be "limited edition prints."

copyright and patent power make sense of the grant of power. On the government's theory, they are inexplicable.

The government claims, for example, that *Feist* drew its requirement that copyright extend to "original" works from the terms "Authors" and "Writings" alone. Resp. Br. 21. That is wrong. *Feist* simply repeated the standard set in the *Trade-Mark Cases,* 100 U.S. 82 (1879), and as this Court explained in a contemporaneous case, the *Trade-Mark Cases* drew their limit from the grant of power. *Higgins v. Keufel,* 140 U.S. 428, 431 (1891). It was because certain writings did not "promote the Progress of Science" that they were excluded from the reach of the copyright power. *Id.* (writing had "no possible influence upon science or the useful arts"). *Accord* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 435 (1985).

The same is true of this Court's restriction on copyright shrinking the public domain. The government responds to this argument by claiming that CTEA does not "remove *knowledge* from the public domain." Resp. Br. 22. That is true, but irrelevant. The question petitioners pose is *why* there is such a limitation on the scope of Congress's Copyright and Patent authority. To this, the government has no answer. Under its method for interpreting "limited Times"—which simply abstracts the term from the Clause and asks whether there is any plain meaning that could uphold Congress's power—there is no reason that Congress could not extend a copyright to an author or inventor whose work has entered the public domain. Indeed, this is precisely the government's claim in a parallel case. *See* Def. Mem. in Supp. Mot. to Dismiss at 22-24, *Golan v. Ashcroft*, D. Colo., No. 01-B-1854, http://eldred.cc/ga.

These implied limitations on Congress's power make sense when the words of the clause are interpreted in light of the "grant of power." They are *per se* restrictions that serve to assure that Congress only grants monopolies that "promote the Progress of Science and useful Arts." "[L]imited Times" should be interpreted in the same manner: Just as the "Authors" and "Writings" that are properly subject to the copyright power are those that "promote … Progress"—*i.e.*, those that are original, and not from the public domain—so too should the "limited Times" that are

authorized under the Copyright Clause be restricted to those that "promote . . . Progress"—*i.e.*, those that grant a term *in exchange for* something new. Pet. Br. 16-17. By granting a blanket, retroactive extension in exchange for nothing new—not for restoring old works, or disseminating old works, or for any other progress-promoting activity—CTEA fails this requirement.[11]

3. Broadening "Progress" Does Not Save CTEA

Tacitly acknowledging the weakness in the government's argument, Senator Hatch suggests that CTEA might be saved by adopting a broader interpretation of "progress." Brief of *Amicus* Sen. Orrin G. Hatch at 6-26. He draws upon new research into the ordinary meaning of "progress" at the time of the framing, and suggests this broader conception—meaning roughly "spread"—validates CTEA. *Id.* at 10, 12. It does not.

Petitioners have adopted the meaning of "progress" employed by this Court. Pet. Br. 15-16. That "progress" is the "creation of useful works." *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 558 (1985). But even if this different conception of "progress" were adopted, CTEA would still be at odds with the structure of the Clause and its framing history.[12] For as petitioners have also demonstrated, whatever the meaning of "progress," the

[11] The only authority the government offers to support its claim that the Framers did not intend that Congress could "protect only 'Authors that promote' progress, or 'Writings that promote' progress" is *Mitchell Bros. Film Group* v. *Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979). Resp. Br. 19. But at the page the government cites, *Mitchell* states that while *each individual copyrighted work* need not "promote the Progress of Science," the Constitution "*require[s] that Congress shall promote those ends*." *Id.* (emphasis added).

[12] Petitioners share Professor Solum's skepticism about this newly discovered meaning of "progress." Solum, *supra*, at 77 ("One might say that the beetle progressed from the center of the table to the edge, but it would be odd, although not inconceivable, to say that the spilled milk progressed to cover the whole table"). In any case, even if "spread" were a common meaning, it would not follow that that meaning was the Framers'. For example, although "secure" had a common meaning at the time of framing—strengthening a preexisting right—this Court in *Wheaton* held there was no preexisting right for patents, at least, and so "secure" could not take that ordinary meaning. *Wheaton*, 33 U.S. at 661.

Framers granted copyright *only as part of a quid pro quo*. Pet. Br. 16. CTEA does not. Thus, even if "progress" means "spread," or "dissemination," or (anachronistically) "restoration," the monopolies that the Framers spread were not granted *on the mere hope* that something would be given in return. Their monopolies were offered upon the *condition* that something was given in return. *See* Paul S. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1143-44 (discussing quid pro quo). It is for this reason, among others, that the author of the primary source Senator Hatch relies upon herself concludes that CTEA is "unconstitutional per se." Brief of *Amicus* Malla Pollack at 13.

C. CTEA Fails Both Heightened Review Standards

Petitioners have advanced a *per se* rule banning retroactive extensions of terms without a quid pro quo. The government resists petitioners' rule by offering historical counter-examples. But if credited, the very same examples would defeat every other *per se* rule that this Court has adopted under the Copyright Clause. *See, e.g.*, Resp. Br. 13-14 (patent extensions removing knowledge from the public domain); *id.* at 14 n.6 (copyrights for works not "original"). Just as such counter-examples are insufficient to overcome these other *per se* rules, they should not defeat a *per se* rule governing "limited Times."

But if this Court finds these examples compelling, then, at the very least, this Court should require that Congress's extensions of term be "congruent and proportional" to a legitimate Copyright Clause end. Pet. Br. 31-32. Both standards ask the same ultimate question—does Congress's grant of a "limited Time[]" extension "promote the Progress of Science." The *per se* rule conclusively presumes, given the current length of the copyright term, that any blanket retroactive extension without a quid pro quo fails to "promote . . . Progress." The proportionality standard, in principle, would permit the government a showing that an extension

was congruent and proportional. On the record in this case, however, CTEA fails both standards.[13]

II. CTEA VIOLATES THE FIRST AMENDMENT

The government argues that any content-neutral copyright law that regulates expression rather than ideas, and preserves fair use, should be tested under rational basis review. Resp. Br. 40-43. Three claims underlie its argument: (1) petitioners have no First Amendment interest in "others' creative expression," Resp. Br. 46; (2) this Court so held in *Harper & Row Publishers, Inc. v. Nation Enterprise*, 471 U.S. 539 (1985), Resp. Br. 40-43; and (3) anything else could "destabilize" copyright law, Resp. Br. 48. All three claims are baseless.

A. CTEA Abridges Speech

The government and its amici assert that petitioners lack a sufficient First Amendment interest to challenge CTEA. They support their claim by belittling petitioners' speech interests. In the government's view, petitioners are mere "public domain copyists," Resp. Br. 17, 36, engaging in nothing more than the "mechanical reproduction" (Brief of *Amici* BNA *et al.* at 30) of "others' creative expression." Resp. Br. 46. And though some of the amici acknowledge that petitioners are more than mere "copyists," these amici fear that petitioners will use the cherished icons of American culture to "glorify drugs or to create pornography." Brief of *Amici* Dr. Seuss Enters. *et al.* at 19. In their view, CTEA's function is to ensure that the right to use these icons remains with those who can best control them.

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[13] The government also rejects the proportionality standard on the ground that it is drawn from federalism cases interpreting a limitation on the scope of Congress's Section 5 authority. Resp. Br. 28-29. But like Section 5, which must balance concerns about federalism against enforcement powers granted by the 14th Amendment, so too must the Copyright Clause balance concerns about free speech against the interest in securing exclusive rights. *See* Richard Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. __ (forthcoming 2002) ("On every side the creation of intellectual property is hemmed in by concerns for freedom of speech, whether or not these matters have received an explicit First Amendment analysis."), http://eldred.cc/e.

Yet plainly, petitioners and their amici are no mere Kinko's.[14] Petitioner Moviecraft is actively engaged in the preservation of early American film, as is *Amicus* Agee and the Prelinger Archives. Drawing upon the public domain films in the Prelinger Archive, documentary and independent filmmakers are able to create rich accounts of early 20th Century America. Using digital technology, *Amicus* Internet Archive has made vast amounts of American culture available free on the Internet, enabling others to build new creative work based upon these resources. Likewise, *Amicus* Michael Hart has converted public domain books into a form that enables computers to "read" those books to the blind. Petitioner Eldred, through the use of Web technology, creates searchable and linkable texts that enable educators to teach differently. The members of *Amicus* National Writers Union obviously produce new creative work, as does *Amicus* College Arts Association. Even petitioner Dover Books, which publishes many public domain works, typically includes within those publications critical analyses of classic texts, thereby enabling a broader understanding of those works.

The government's arguments do demonstrate, however, just why First Amendment review is necessary in a case like this. For to the extent Congress was choosing between "favored" creators and mere "public domain copyists," its choice signals a favoritism that could even raise a colorable claim for strict scrutiny under the First Amendment. *Turner Broadcasting v. FCC,* 512 U.S. 622, 676 (1994) (O'Connor, J., dissenting).

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[14] Nor does copyright reach "mechanical" reproductions only: While the "exclusive Right" regulated at the founding was little more than the right to control republication, copyright law today regulates much more broadly—to include, importantly, derivative works such as translations and adaptations. When future Senator Alan Cranston was sued in 1939 by the copyright holders of "Mein Kampf" for his unauthorized (and critically revealing) translation of that work, his speech was much more than the work of a "mere copyist." *See Houghton Mifflin Co. v. Noram Publ'g Co.,* 28 F. Supp. 676 (S.D.N.Y. 1939). When Alvin Katz and Chris Wrinn wrote a parody of the O.J. Simpson trial in the form of "The Cat in the Hat," their clever twist on the original, though restricted because not parody, was certainly not mere copying. *See* Brief of *Amici* Dr. Suess Enters. *et al.* at 25.

When Congress grants copyrights prospectively, it cannot know who will benefit from its grant. It therefore cannot select from among the potential beneficiaries those it likes and those it does not. But whenever Congress extends copyright terms retroactively, it is necessarily choosing among classes of speakers. That choice raises fundamental First Amendment concerns. *See, e.g., id.* ("it is normally not within the government's power to decide who may speak and who may not"); *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). *See generally* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein,* 54 STAN. L. REV. 1, 54-69 (2001).

In this case, for example, Congress was lobbied by the current owners of some of America's most famous creative works to give them a right to control work over which they otherwise would have had no claim. In granting these owners this new right, Congress necessarily chose between them and the creators and "copyists" who draw upon the public domain—authors such as petitioners, or their amici, or the next Walt Disney. *See* Brief of *Amici* National Writers Union *et al.* at 13; Brief of *Amici* Intellectual Property Law Professors at 20-21 (cataloging Disney's use of the public domain). That choice may well have been motivated by an objective judgment about who, between these two classes of creators, could best fuel an "engine of free expression." *Harper*, 471 U.S. at 558. But it may also have been motivated by a preference for these "favored" speakers over others.

It is precisely the risk of such favoritism that the First Amendment must police. Where there is a danger that a preference for certain speakers is operating to *restrict* speech, First Amendment review is designed to sift between appropriate and inappropriate motives. And while a related concern led some on this Court to suggest strict scrutiny in the context of cable regulation, *Turner Broadcasting,* 512 U.S. at 677-78 (O'Connor, J., dissenting), this Court need not apply that exacting standard to conclude that CTEA violates the First Amendment. Intermediate review as

adopted by this Court in *Turner* is sufficient to render CTEA unconstitutional.

The government tries to distinguish *Turner* by arguing the case was only about "forced access." Resp. Br. 45-46. *Turner* is not so limited. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (applying *Turner* to law that suppressed speech). Congress plainly could not escape heightened First Amendment review of cable regulations simply by reformulating "forced access" regulations into "banned access" regulations (requiring cable companies "not to carry" specified content on more than x% of its channels). Like copyright law itself, that regulation would "reduce the number of channels over which cable operators exercise unfettered control," *Turner,* 512 U.S. at 637, raising equivalent First Amendment concerns. The government therefore cannot distinguish *Turner*.

B. *Harper* Supports First Amendment Review

The government argues that *Harper* precludes any heightened review of CTEA. That conclusion would surprise the author who inspired the standard adopted in *Harper*. As scholars have noted, *Harper* drew its "definitional balancing" test from a 1970 article by Melville Nimmer. *See, e.g.,* Netanel, *supra*, at 7-12, citing Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970). In that same article, after describing "definitional balancing," Nimmer went on to address "specific areas where … [definitional balancing] does not properly balance the conflicting interests in copyright and free speech," *Id.* at 1193. The very first of these "specific areas" was copyright duration. As Nimmer concluded, retroactive extensions of copyright terms violate the First Amendment, *id.* at 1194-95, and Copyright Clause. *Id.* at 1195.

The reason "definitional balancing" did not resolve changes in duration is apparent from the opinion in *Harper* itself. *Harper* rejected a "public figure exception to copyright," 471 U.S. at 556-60, because copyright law, the Court observed, already contained built-in accommodations that mediated any conflicts between the First Amendment and copyright's scope. Given the facts of the case, because the Copyright Act (1) protects expression rather than ideas, and (2) allows for fair use, there was no need to add further restrictions on copyright law in the name of free speech.

Id. These two built-in accommodations were enough. If Congress were to change these two accommodations, then, as the government concedes, First Amendment review would "undoubtedly" be appropriate. Resp. Br. 41-42. But because CTEA does not change these particular accommodations, the government asserts that rational basis is the standard of review.

Yet *Harper* nowhere states that these two accommodations between First Amendment interests and copyright are the *only* accommodations built into the Act. They were simply the two at issue, and they sufficed to resolve the case. And as Nimmer's analysis makes clear, limitations on copyright's duration are *also* accommodations built into the Act (and mandated by the Constitution) that balance First Amendment interests and copyright. As Justice Stewart wrote for the Court in *Twentieth Century Music Corp. v. Aiken*, "[t]he limited scope of the copyright holder's statutory monopoly, *like the limited copyright duration* required by the Constitution, reflects a balance of *competing claims* upon the public interest." 422 U.S. 151, 156 (1975) (emphasis added).

If changes in the "balance" struck by the "limited scope" of copyright require First Amendment reweighing, then changes in the "limited . . . duration" of copyright must require First Amendment reweighing as well. No difference of principle could distinguish these two separate accommodations—especially as the free speech interests protected by limitations on duration are plainly distinct from the interests protected by limitations on scope. Pet. Br. 35-36.

C. Intermediate Review Has Not, and Will Not, "Destabilize" Copyright Law

The government asserts that heightened review could destabilize copyright law. Resp. Br. 48. It writes as if petitioners are the first to raise a claim for intermediate review of a copyright statute. Resp. Br. 45. But as the government is aware, an increasing number of courts have applied intermediate scrutiny to what the government calls "copyright statutes." Pet. Opp. 22; Pet. Reply 4-5. Either the government believes those cases are wrong, or it believes there is a clear line between those cases and this. The government has not said which it believes.

In any case, the government's fears are baseless. There is no slippery slope here because there is no slope. Just as *Harper* addressed the First Amendment in the narrow context of a claim about copyright's scope, this case should address the First Amendment in the narrow context of copyright duration mandated by the "limited Times" clause. Its rule, of course, should govern any future change in copyright duration. But as Congress, on the government's count, has changed copyright duration just five times in 210 years, Resp. Br. 7, there is no risk of a flood of new litigation. This is especially true if this Court strikes retroactive extensions, for given the current length of copyright, there could be no present incentive to extend the term prospectively again. Brief of *Amici* Akerlof *et al.* at 8. This case is therefore that rare example when one decision would decide the field.

D. The Government Effectively Concedes CTEA Cannot Survive Intermediate Review

For the first time in an appellate proceeding, the government has attempted to justify CTEA under heightened review. While it does not argue that the interests that retroactive changes are alleged to advance suffice for intermediate review,[15] it now argues, by analogy to a trademark case, that CTEA is constitutional. Resp. Br. 48 n.30 (citing *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987)).

This mocks intermediate review. A finding that a single trademark does not violate the First Amendment cannot, under the demands of intermediate review, automatically validate a term extension of a whole class of copyrights. Nor can it resolve the question of narrow tailoring. The grant of a particular trademark

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[15] The government has retreated from its claim below that CTEA "harmonizes" copyright law, Resp. Br. 3 (it now harmonizes just a "baseline" term), and it does not suggest that international trade considerations satisfy intermediate review. Resp. Br. 37-39. Likewise, the government has not suggested that *any* meager increase in incentives alleged to be produced by retroactive changes is enough to satisfy heightened review. In light of the analysis of economists *Amici* Akerlof *et al.*, the government's reluctance is understandable. In any case, neither trade nor harmonization may trump the constitutional requirement of "limited Times."

to a particular organization is at least tailored to a particular end. A blanket extension of all subsisting copyrights is not.

More fundamentally, there is no way that the government *could* satisfy *any* tailoring requirement on this record. Petitioners argued that if Congress wanted "restoration" of old works, or further "dissemination" of particular works, it could easily have achieved those ends in the same manner the Framers set—as a quid pro quo. Pet. Br. 16. Rather than an unconditioned grant, Congress could have offered a conditioned grant for restoration or a particular kind of dissemination. The government has offered no reply to this argument, Resp. Br. 34-37, because there is none. There was no reason for Congress to extend the term of all copyrights to secure the "restoration" or "dissemination" of some. As Professor Currie suggests, a concern for over-inclusiveness guided this Court's decision under the Copyright Clause in the *Trade-Mark Cases*. CURRIE, *supra,* 435 n.35. A similar principle should, under the First Amendment, ban extending the term of *all* copyrights on the hope that some *might* be restored.[16]

CONCLUSION

For the foregoing reasons, and in the manner described in petitioners' opening brief, Pet. Br. 50, the judgment of the court of appeals should be reversed.

[16] The government has also effectively conceded severability. It notes the court below did not pass on the question, Resp. Br. 48 n.31. But as resolving severability may allow this Court to avoid the constitutional question of prospective extensions, Pet. Br. 48, that is not a sufficient reason to avoid the issue now. Because Congress could not have intended severability where, as here, the text of the statute simply does not allow itself to be severed in a way that could apply constitutionally, the CTEA's entire extension of copyright terms must be struck.

Respectfully submitted,

GEOFFREY S. STEWART
DONALD B. AYER
ROBERT P. DUCATMAN
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

CHARLES R. NESSON
WILLIAM W. FISHER
JONATHAN L. ZITTRAIN
THE BERKMAN CENTER FOR INTERNET & SOCIETY
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-7547

LAWRENCE LESSIG
(Counsel of Record)
KATHLEEN M. SULLIVAN
ALAN B. MORRISON
EDWARD LEE
STANFORD LAW SCHOOL CENTER FOR INTERNET & SOCIETY
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-0999

CHARLES FRIED
Griswold Hall
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4636
Counsel for Petitioners

Comparison of Copyright Acts
1790, 1831, 1909, 1976, 1998

Property	1790	1831	1909	1976	1998
Extends terms of "subsisting works"	**Yes**	No	No	No	**No**
Extends terms of "subsisting copyrights"	**No**	Yes	Yes	Yes	**Yes**
Extends as part of a quid pro quo	**Yes**	No	No	Yes	**No**
Grants benefits presumptively to authors	**Yes**	Yes	No	No	**No**
Part of general copyright revision	**Yes**	Yes	Yes	Yes	**No**
Extends terms that had been extended before	**No**	No	No	Yes	**Yes**